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No._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN DEREK O'BRIEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to The United States Court Of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. WHETHER A SENTENCING JUDGE MAY DEPART DOWNWARD WHEN THERE HAS BEEN POST-OFFENSE REMORSE AND ACCEPTANCE OF RESPONSIBILITY, ACTUAL SUBSTANTIAL REHABILITATION, AND COMMUNITY RESTITUTION SO BEYOND ANY JUDICIAL MANDATE, AND SO EXTRAORDINARY AS TO DEMONSTRATE THEIR PRESENCE TO A DEGREE NOT ADEQUATELY TAKEN INTO CONSIDERATION BY THE SENTENCING GUIDELINES.

LIST OF ALL PARTIES TO THE PROCEEDINGS

1. John Derek O'Brien
2. United States of America

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTION 3

STATUTORY AND FEDERAL SENTENCING GUIDELINE PROVISIONS INVOLVED . . . 3

ARGUMENT 5

AN EXTRAORDINARY DEMONSTRATION OF REMORSE AND ACCEPTANCE OF RESPONSIBILITY, ACTUAL REHABILITATION, AND COMMUNITY RESTITUTION WARRANTS A DOWNWARD DEPARTURE. 5

CONCLUSION 7

APPENDIX A 1a

APPENDIX B 9a

APPENDIX C 11a

APPENDIX D 13a

APPENDIX E 21a

TABLE OF AUTHORITIES

CASES **Page**

United States v. Baker,
19 F.3d 605 (11th Cir. 1994) 4, 6

United States v. Brown,
985 F.2d 478 (9th Cir. 1993) 4, 6

United States v. Carey,
895 F.2d 318 (7th Cir. 1990) 4, 6

United States v. Cook,
938 F.2d 149 (9th Cir. 1991) 6

United States v. Crumb,
902 F.2d 1337 (8th Cir. 1990) 4, 6

United States v.Garlich,
951 F.2d 161 (8th Cir. 1991) 4, 6

United States v. Harrington,
947 F.2d 956 (D.C. Cir. 1991) 4, 6

United States v. Lieberman,
971 F.2d 989 (3rd Cir. 1992) 4, 6

United States v. Maddalena,
893 F.2d 815 (6th Cir. 1989) 5, 6

United States v. O'Brien,
18 F.3d 302 (5th Cir. 1994). 2, 4

United States v. O'Brien,
950 F.2d 969 (5th Cir. 1991), cert.
denied, —— U.S.——, 113 S.Ct. 64
(1992) 2, 4

United States v. Rogers,
972 F.2d 489 (2nd Cir. 1992) 4, 6

United States v. Sklar,
920 F.2d 107 (1st Cir. 1990) 4, 6

United States v. Williams,
948 F.2d 706 (11th Cir. 1991) 4

STATUTES

18 U.S.C., §3553(b) 3, 6

28 U.S.C. §1254(1) 3

MISCELLANEOUS

Sec. 5K2 Federal Sentencing
Guideline Manual 3

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN DEREK O'BRIEN

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, John Derek O'Brien, praying that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on March 24, 1994, files this his Petition For Writ of Certiorari, saying more particularly in support thereof as follows:

OPINIONS AND JUDGMENTS BELOW

Petitioner John Derek O'Brien was charged in a two count indictment with conspiracy to possess and possession of marijuana plants with intent to distribute. After the trial court overruled his motion to suppress evidence, he entered a conditional plea of guilty. Petitioner was sentenced on September 21, 1991, to twelve months in prison (a downward departure from the base guideline range of 33 to 41 months imprisonment), followed by five years of

supervised release. He was also fined ten thousand dollars plus a one hundred dollar assessment. Petitioner appealed the trial court's order on his motion to suppress, and the Government appealed the downward departure on his sentence. The Fifth Circuit Court of Appeals affirmed the trial court's judgment on the admissibility of the challenged evidence, but vacated Petitioner's sentence. See, **United States v. O'Brien**, 950 F.2d 969 (5th Cir. 1991), cert. denied, —— U.S.——, 113 S.Ct. 64 (1992).

At resentencing on March 9, 1993, the trial court again downwardly departed from the base guideline range and imposed five years of probation, a ten thousand dollar fine, and a one hundred dollar assessment. As a condition of his probation, the trial court required four hundred hours of community service. In accord with the Court of Appeals' prior judgment and opinion, the trial court detailed its reasons for departing downward. Despite that court's thoughtful delineation and analysis of the Sentencing Guidelines, the Government appealed.

The Fifth Circuit Court of Appeals vacated the Petitioner's second sentence and mischaracterized the trial court's downward departure as being based upon a finding that Petitioner's criminal conduct was aberrant behavior. The Opinion handed down by the Fifth Circuit is cited at **United States v. O'Brien**, 18 F.3d 301 (5th Cir. 1994) and is set out at Appendix A. The Fifth Circuit's judgment is set out at Appendix B.

The Court of Appeals denied Petitioner's timely Motion for Panel Rehearing and Suggestion for Rehearing En Banc, as evidenced by the Order set out at Appendix C.

JURISDICTION

Petitioner has satisfied all appellate prerequisites. The Supreme Court's jurisdiction is by virtue of 28 U.S.C. §1254(1).

STATUTORY AND FEDERAL SENTENCING GUIDELINE PROVISIONS INVOLVED

18 U.S.C., §3553(b) says:

"(b) **Application of guideline in imposing a sentence.** -- The court shall impose a sentence of the kind and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." (emphasis added)

Sec. 5K2.0, Federal Sentencing Guidelines Manual, states, in pertinent part:

"§5K2.0. **GROUNDS FOR DEPARTURE**
(Policy Statement)

Under 18 U.S.C. §3553(b) the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in

formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts."

STATEMENT OF THE CASE

The facts and history of this case are related at United States v. O'Brien, 18 F.3d 301 (5th Cir. 1994) (Appendix A), and United States v. O'Brien, 950 F.2d 969 (5th Cir. 1991), cert. denied, ——U.S.—— 113 S.Ct. 64 (1992) (Appendix D).

REASONS FOR ALLOWANCE OF THE WRIT

1. The Fifth Circuit's opinion that the Federal Sentencing Guidelines do not permit a downward departure based on an extraordinary demonstration of post-offense remorse and acceptance of responsibility, actual rehabilitation, and community restitution to a degree not adequately considered by the guidelines conflicts with the guidelines themselves and with the majority of the Courts of Appeals considering the same issue. See, United States v. Baker, 19 F.3d 605, 615-616 (11th Cir. 1994) (citing United States v. Williams, 948 F.2d 706 (11th Cir. 1991)); United States v. Brown, 985 F.2d 478, 493 (9th Cir. 1993); United States v. Rogers, 972 F.2d 489, 493 (2nd Cir. 1992); United States v. Lieberman, 971 F.2d 989, 996 (3rd Cir. 1992); United States v. Garlich, 951 F.2d 161, 163 (8th Cir. 1991); United States v. Harrington, 947 F.2d 956, 961-963 (D.C. Cir. 1991); United States v. Sklar, 920 F.2d 107, 116 (1st Cir. 1990); United States v. Crumb,

902 F.2d 1337, 1339-1340 (8th Cir. 1990); United States v. Carey, 895 F.2d 318, 323-324 (7th Cir. 1990); United States v. Maddalena, 893 F.2d 815, 819 (6th Cir. 1989).

This conflict is not a mere incidental discrepancy. Justice is not geographical. The Federal Guidelines were established to provide uniformity. However, but for the misfortune of the particular location of Petitioner's trial court, his sentence would have been affirmed by the overwhelming majority of the United States' Courts of Appeal.

ARGUMENT

AN EXTRAORDINARY DEMONSTRATION OF REMORSE AND ACCEPTANCE OF RESPONSIBILITY, ACTUAL REHABILITATION, AND COMMUNITY RESTITUTION WARRANTS A DOWNWARD DEPARTURE.

Petitioner's base sentencing guideline range was between 33 and 41 months. However, upon consideration of the facts before him, the sentencing judge departed downward and sentenced the Petitioner to five years of probation and imposed a ten thousand dollar fine plus a one hundred dollar assessment. The court's stated reasons for departure are set forth in Appendix E.

Among the specific reasons for departure stated by the trial court are that "this [case] is one of those circumstances that is unusual and remarkable; that the base offense level...over-represents the actual seriousness of the defendant's criminality; that criminality is clearly atypical of [defendant's] demonstrated behavior within the community; [and, that in] considering all these matters, the court finds

that there - in the interest of justice require a downward departure." The trial court did not state, as the Fifth Circuit mischaracterized it as doing, that it relied solely upon Petitioner's post-conviction community service and that his conduct was "aberrant behavior." See, O'Brien, 18 F.3d at 302-303. Rather, the trial court collectively and correctly considered all the evidence before it. Far from being an abuse of discretion, the trial court's departure was supported and warranted.

Although 18 U.S.C. §3553(b) speaks in the singular of a departure being warranted in the presence of a "mitigating circumstance," there is no reason to be so literal-minded as to hold that a combination of factors cannot together constitute a "mitigating circumstance." United States v. Cook, 938 F.2d 149, 153 (9th Cir. 1991); see also, United States v. Simpson, 7 F.3d 813, 820 (8th Cir. 1993) (totality of circumstances must be considered). In making a decision in any particular case, good judgment will often require the evaluation of a complex of factors. Cook, 938 F.2d at 153. Examples of individual mitigating circumstances are remorse and acceptance of responsibility, actual rehabilitation, and community restitution. See e.g., Harrington, 947 F.2d at 962 (acceptance of responsibility and rehabilitation); Baker, 19 F.3d at 616 (rehabilitation); Garlich, 951 F.2d at 161 (restitution). A mitigating circumstance of any kind, or collection, justifies a downward departure when it is so extraordinary as to demonstrate its presence to a degree not adequately taken into consideration by the Sentencing Guidelines. See, Baker, 19 F.3d at 615-616; Brown, 985 F.2d at 482-483; Rogers, 972 F.2d at 493, Lieberman, 971 F.2d at 996; Garlich, 951 F.2d at 163; Harrington, 947 F.2d at 961-963; Sklar, 920 F.2d at 116; Crumb, 902 F.2d at 1339-1340; Carey, 895 F.2d at 323-324; Maddalena, 893 F.2d at 819.

In this particular case, Petitioner's remorse and acceptance of responsibility, actual rehabilitation, and community restitution have each been extraordinary. Individually and collectively, they present a mitigating circumstance to a degree not adequately considered by the Sentencing Commission when formulating the Guidelines. This unavoidable fact was recognized by the sentencing judge. See, Appendix E. Thus, the downward departure ordered by the trial court was supported and warranted.

The Fifth Circuit's vacation of Petitioner's sentence is an unjust quirk of geography. If the sentence had been imposed in the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Eleventh or District of Columbia Circuit, Petitioner would not now be seeking this Court's relief. Such an absence of uniformity does violence to the letter and spirit of the Sentencing Guidelines. Accordingly, this Court should issue a writ of certiorari.

CONCLUSION

Petitioner respectfully prays that this Honorable Court will grant this Petition For Writ of Certiorari for the reasons stated and that he will be given the opportunity to further brief and argue the issues raised herein.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

V.

John Derek O'BRIEN ,
Defendant-Appellee.

No. 93-8291

United States Court of Appeals
Fifth Circuit.

March 24, 1994.

Defendant was convicted in the United States District Court for the Western District of Texas, James R. Nowlin, pursuant to his guilty pleas, of two counts of conspiracy and possession with intent to distribute marijuana, and downward departure sentence of 12 months' imprisonment and five years of supervised release was imposed. Defendant appealed, challenging denial of motion to suppress, and government appealed downward departure. The Court of Appeals, 950 F.2d 969, affirmed conviction, but vacated sentence and remanded for resentencing. On remand, the District Court imposed sentence of five years of probation, and no term of imprisonment. Government appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) defendant's postconviction community service, including musical performances worldwide, did not warrant downward departure, and (2) defendant's conduct did not qualify as "spontaneous and seemingly thoughtless act," so as to provide basis for downward departure on ground of "aberrant behavior."

Vacated and remanded.

1. Criminal Law 1204(3), 1297

Defendant's postconviction community service, including musical performances worldwide, did not warrant downward departure from Sentencing Guidelines; Sentencing Commission considered effect on sentencing of defendant's professional skills and professional record using them when writing Guidelines, and extent of defendant's behavior did not bring him outside sentencing "heartland." 18 U.S.C.A. §3553(b); U.S.S.G., Ch. 1, Pt. A. intro., 4(b), §§ 5H1.2, p.s., 5K2.0, p.s., 18 U.S.C.A. App.

2. Criminal Law 1263

Decision to depart from Sentencing Guidelines based on evidence about defendant's character, whether it related to his character before or after conviction still tries to predict defendant's future behavior based upon all his past actions, and such assessments of character are inconsistent with Guidelines. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

3. Criminal law 1303

Conduct of defendant convicted on conspiracy and possession with intent to distribute marijuana did not qualify as "spontaneous and seemingly thoughtless act," so as to provide basis for downward departure from Sentencing Guidelines on ground of "aberrant behavior"; officers witnessed defendant several times at barn containing 796 marijuana plants, he had key to entrance gate, search of his residence uncovered ledgers, receipts and $5,665 cash, and he did not withdraw from his criminal activities until arrested. U.S.S.G. Ch. 1, Pt. A. intro., 4(d), 18 U.S.C.A.App.

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law 1192

Case would not be reassigned to different sentencing judge on remand, even though it had appeared before Court of Appeals twice.

Richard L. Durbin, Jr., Asst. U.S. Atty., James H. Dealty, Acting U.S. Atty., San Antonio, TX, for U.S.

Dick DeGuerin, DeGuering (sic) & Dickson, Houston, TX, for defendant-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before HIGGINBOTHAM and WIENER, Circuit Judges, and KAUFMAN,* District Judge.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

We conclude that John O'Brien's postconviction community service did not justify a downward departure and remand for resentencing.

* District Judge of the District of Maryland, sitting by designation.

I.

John O'Brien pled guilty in 1990 to charges of conspiracy and possession with intent to distribute more than fifty marijuana plants. 21 U.S.C. §§ 841(a)(1) & 846. The probation officer, based on O'Brien's offense level of 22 and criminal history category of I, calculated a Guideline sentence of 41 to 51 months imprisonment, to be followed by three to five years' supervised release on both of the counts to which O'Brien pled guilty. The district judge granted a two-level reduction in the offense level for acceptance of responsibility, lowering the prison term recommended by the Guidelines to 33 to 41 months.

At O'Brien's 1990 sentencing hearing, the district judge departed downward from the Guidelines range, imposing a sentence of 12 months imprisonment and five years of supervised release. The judge offered two reasons: that O'Brien had strong ties to the community of Austin, Texas, including associations with charitable groups in the Austin area, and that O'Brien was "basically a worthwhile person." *United States v. O'Brien*, 950 F.2d 969, 970-71 (5th Cir. 1991), *cert. denied*, —U.S. —, 113 S.Ct. 64, 121 L.Ed.2d 31 (1992).

O'Brien appealed his conviction, advancing a Fourth Amendment challenge to the trial judge's denial of a motion to suppress. The government appealed the downward departure. This court affirmed O'Brien's conviction and vacated O'Brien's sentence, holding that "the reasons proffered by the district judge were insufficient to justify a downward departure." *O'Brien*, 950 F.2d at 970. *See also United States v. Pace*, 955 F.2d 270 (5th Cir. 1992).

On remand for resentencing in March of 1993, the trial judge departed downward even further. Again faced with a Guidelines range of 33 to 41 month imprisonment, the judge imposed five years of probation and no term of imprisonment. The judge's first rationale was the extent of the defendant's community service since conviction, which included musical performances worldwide, organizing benefit shows for various social service and charitable organizations, and working in a music program in the Austin public schools. The judge's second rationale was the "clearly atypical" nature of the defendant's conduct. The government appeals the judge's downward departure decision.

II.

[1] The district court erred in departing downward because of O'Brien's postconviction community service. O'Brien engaged in the type of community service that he did because of the skills he developed as a professional musician. When writing the Guidelines, the Sentencing Commission considered the effect on sentencing of a defendant's professional skills and professional record using them. *See* U.S.S.G. § 5H1.2 (educational and vocational skills not ordinarily relevant in determining whether a sentence should be outside the guideline); § 5H1.5 (employment record not ordinarily relevant in determining whether a sentence should be outside the guidelines).[1] The Commission's consideration of these factors means they were not a permissible ground for departure. 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0.

---

[1] To avoid any ex post facto problem with the application of the Guidelines version in effect at O'Brien's resentencing, we rely on the version in effect at the time of his offense. *See United States v. Clark*, 8 F.3d 839 (D.C. Cir. 1993) We note that effective November 1, 1991 the Guidelines provide that "civic, charitable, or public service ... good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." U.S.S.G. § 5H1.11.

[2] O'Brien argues that his case does not involve a subjective guess about his future behavior because he has established a solid record of achievement in the time since his conviction. We reject this argument. A departure decision based on evidence about a defendant's character, whether it relates to his character before or after conviction, still tries to predict the defendant's future behavior based upon his past actions. Such assessments of a defendant's character are inconsistent with the Guidelines. *See, e.g., O'Brien*, 950 F.2d at 971 n.1; *United States v. Lara-Velasquez*, 919 F.2d 946, 954 (5th Cir. 1990) (no downward departure for rehabilitative potential); *O'Brien*, 950 F.2d at 971; *United States v. Reed*, 882 F.2d 147, 151 (5th Cir. 1989) (no downward departure because of a defendant's "worth" or "good"). *See generally Lara-Velasquez*, 919 F.2d at 954; *United States v. Mejia-Orosco*, 867 F.2d 216, 218 (5th Cir.), *cert. denied*, 492 U.S. 924, 109 S.Ct. 3257, 106 L.Ed.2d 602 (1989) (both noting Congress's goal in enacting the Guidelines of ending sentencing based on subjective predictions about a defendant's rehabilitative potential).

O'Brien argues that even if the Commission addressed the type of behavior in which he engaged, it did not anticipate the extent of his behavior. *See* U.S.C. 3553(b); U.S.S.G. § 5k2.0 We find nothing in this case taking it out of the "heartland" ... of typical cases embodying the conduct that [the] guideline describes." U.S.S.G. ch. 1 pt. A § 4(b), at 1.6 (Introduction). O'Brien has talent and the respect of many people, but so do many professionals who come before the courts for sentencing. We see no way to take O'Brien's case out of the "heartland" without drawing subtle distinctions between the way O'Brien used his musical skills and the way other professionals subject to sentencing have employed their talents. The Guidelines do not envision this kind of subjective decisionmaking.

III.

[3] The district court also justified its departure because it viewed O'Brien's criminal activity as "clearly atypical." In an introductory section of the Guidelines entitled "Probation and Split Sentences," the Commission states that it "has not dealt with single acts of aberrant behavior that still may justify probation at higher offense levels through departures." U.S.S.G. Ch. 1 Pt. A, intro. emt. 4(d). This court has stated that "aberrant behavior" requires more than an act which is merely a first offense or "out of character" for the defendant, as the Guidelines take those considerations into account in calculating the defendant's criminal history category. *United States v. Williams*, 974 F.2d 25, 26 (5th Cir. 1992). Aberrant behavior "generally contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning because an act which occurs suddenly and is not the result of a continued reflective process is one for which the defendant may be arguably less accountable." *Id.* at 26-27 (quoting *United States v. Carey*, 895 F.2d 318, 325 (7th Cir. 1990)).

O'Brien's conduct in this case does not qualify as a "spontaneous and seemingly thoughtless" act. Law enforcement officers several times witnessed O'Brien at a barn containing 796 growing marijuana plants and on the day they executed the search warrant O'Brien was found on the property with a key to the entrance gate. A search of O'Brien's residence uncovered ledgers, accounts, receipts, and $5,665 in case.

O'Brien draws unpersuasive analogies to two cases from other circuits. Unlike the defendant in *United States v. Russell*, 870 F.2d 18 (1st Cir. 1989), and one of the defendants in *United States v. Takai*, 941 F.2d 738 (9th Cir.

1991), O'Brien did not withdraw from his criminal activity until arrested. And unlike the other defendant found to have engaged in aberrant conduct in *Takai*, O'Brien maintained ongoing contact with the enterprise and its operations. *Cf. Takai*, 941 F.2d at 743.

IV.

[4] The parties brief the question whether we should reassign this case to a different judge of remand. Mindful of the fact that this case has appeared before us twice, we remand to the same judge. "The district judge will, we are confident, perform his duty. It is unseemly for us to either assume that he will take a particular course or to suggest what he should do so long as he reaches his decision in accordance with the controlling statute." *United States v. Denson*, 603 F.2d 1143, 1149 (5th Cir. 1979). There is much to be said for according district judges the power exercised in this case. Many critics of the sentencing guidelines would prefer to do so. But we have no choice but to apply the law as directed by the Congress.

VACATED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED
MAY 4 1994
U.S. DISTRICT COURT
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U.S. COURT OF APPEALS
FILED
MAR 24 1994
CHARLES R. FULBRUGE III
CLERK

No. 93-8291

D.C. Docket No. A-89CR-108(1)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

Received
MAY 3
1994

JOHN DEREK O'BRIEN,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

Before HIGGINBOTHAM and WIENER, Circuit Judges, and KAUFMAN, [1] District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

[1] District Judge of the District of Maryland, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

March 24, 1994

ISSUED AS MANDATE: ....copy

test:

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By: /s/ Laurie Carlton

New Orleans, Louisiana

APPENDIX C

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U.S. COURT OF APPEALS
F I L E D
APR 20 1994
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8291

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
versus
JOHN DEREK O'BRIEN,
Defendant-Appellee,

Appeals from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion, March 24, 1994, 5 Cir., _____, _____ F.2d _____).

(April 20, 1994)

Before HIGGINBOTHAM and WIENER, Circuit Judges and KAUFMAN*, District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

* District Judge of the District of Maryland, sitting by designation.

CLERK'S NOTE
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX D

UNITED STATES of America, Plaintiff Appellee Cross-Appellant,
v.
John D. O'BRIEN, Defendant-Appellant Cross-Appellant.
No. 90-8549.

United States Court of Appeals,
Fifth Circuit
Dec. 30, 1991.

Rehearing Denied Feb. 13, 1992.

Defendant was convicted in the United States District Court for the Western District of Texas, James R. Nowlin, J., pursuant to his guilty pleas, of two counts of conspiracy and possession with intent to distribute marijuana, and he appealed, challenging denial of motion to suppress. The Court of Appeals, King, Circuit Judge, held that: (1) there was probable cause for search of defendant's home. (2) community ties were not valid reason for downward departure from Sentencing Guidelines; and (3) notion that defendant possessed redeeming characteristic of being "worthwhile person" did not provide adequate basis for downward departure.

Conviction affirmed, sentence vacated and matter remanded for resentencing.

1. Drugs and Narcotics 185(2)

Evidence seized from barn during execution of search warrant, combined with officers' experience with business practices of drug traffickers, furnished sufficient probable

cause for search of defendant's home. U.S.C.A. Const. Amend. 4

2. Criminal Law 1297

Defendant's community ties cannot be used to depart below applicable Sentencing Guidelines range. U.S.S.G. §5H1.6, p.s., 18 U.S.C.A.App.

3. Criminal Law 1297

Notion that defendant possessed redeeming characteristic of being "worthwhile person" did not provide adequate basis for downward departure from applicable Sentencing Guidelines range. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

4. Criminal Law 1298

Remorse and acceptance of responsibility for crime defendant expressed at his allocution could not be valid reason for downward departure from Sentencing Guidelines after reduction in base offense level was made for acceptance of responsibility. U.S.S.G. § 3E1.1, 18 U.S.C.A.App.

5. Criminal Law 1297

Rehabilitative potential is not valid basis for downward departure from applicable Sentencing Guidelines range. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

Dick DeGuerin, DeGuerin & Dickson, Houston, Tex., for defendant-appellant cross-appellee.

LeRoy Morgan Jahn, Diane D. Kirstein, Asst. U.S. Atty., San Antonio, Tex. for plaintiff-appellee cross appellant.

Appeals from the United States District Court for the Western District of Texas.

Before POLITZ, KING and JOHNSON, Circuit Judges.

KING, Circuit Judge:

John O'Brien pled guilty to two counts of conspiracy and possession with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846, reserving the right to appeal the denial of his motion to suppress evidence seized from the barn and from his home. He was sentenced to 12 months imprisonment, a five year term of supervised release, a $10,000 fine and a $100 special assessment. O'Brien appeals the denial of his suppression motion and the government appeals the sentence.

[1] O'Brien was arrested along with Charles D. Pace and John K. Treanor following the execution of a search warrant in a barn in Travis County, Texas. The factual background relevant to O'Brien's appeal is detailed in our opinion in *United States v. Pace*, 950 F.2d 961 (5th Cir. 1991). O'Brien's appeal raises the same issues as did Pace's with respect to denial of the motion to suppress the evidence seized from the barn. O'Brien also raises the same objection as did Pace with respect to the evidence seized from the home he shared with Treanor. We adopt the analysis in *Pace* as it applied to the search of the barn. As in *Pace, we* also find that the evidence seized from the barn, combined with the officers' experience with the business practices of drug traffickers, furnished sufficient probable cause for a search of the home of O'Brian and Treanor. We therefore affirm the denial of the suppression motion .

We next consider the government's appeal of O'Brien's sentence. The probation officer calculated a guideline range of 41 to 51 months imprisonment, based on a total offense level of 22 and a criminal history score of zero. *See* U.S.S.G. Sentencing Table. The district judge granted a two-level reduction in the base offense level for acceptance of responsibility, resulting in a guideline range of 33 to 41 months. He then departed downward to a total term of imprisonment of 12 months after stating that "there is in existence in your case the unusual factor of your work in the community and your interest in providing assistance to those who are less fortunate than you that appears in the record."

The government initially argues that the sentence should be vacated because the district court failed to explain its reasons for departing downward. A sentencing court may depart from the guideline range if it finds aggravating or mitigating circumstances that the guidelines do not adequately take into account, 18 U.S.C. § 3553(b), but it is clear that the court must articulate its reasons for departing, *Id.* § 3553(c); *United States v. Huddleston*, 929 F.2d 1030, 1031 (5th Cir. 1991); *United States v. Murillo*, 902 F.2d 1169, 1172 (5th Cir. 1990). Although a reading of the transcript of the sentencing hearing reveals that the judge was somewhat laconic about the particular reasons for departure, we find that the statement quoted in the previous paragraph constitutes at the very least a statement of the reasons for the imposition of a sentence outside the guideline range as contemplated by 18 U.S.C. § 3553(c). This is not to say that the court's explanation was adequate. (We will address that question momentarily.) We merely hold that reasons were put forward for the departure, and decline to vacate the sentence on the ground that the district judge gave no explanation at all.

The government is correct, however, that the reasons proffered by the district judge were insufficient to justify a downward departure. We divine two separate but related reasons in the district judge's statement, one which appears on the fact of the statement and one which seems fairly to be inferred. First, it is obvious that the judge took into account O'Brien's ties to the community and his history of community service. The PSI indicated that O'Brien, a musician, had played benefit concerts and had a history of association with charitable causes in the Austin area. O'Brien's allocution was devoted in part to describing his longstanding ties to the area and his charitable work. Moreover, the judge referred to the many letters of support he had received from friends of O'Brien which "provide a glimpse of you as basically a worthwhile person, a person who has been interested in doing generous things for the community and for people who were in need." Second, it appears that the judge took into account his general view that O'Brien had redeeming characteristics. While this is not evident in the final statement before sentencing, we believe it can be inferred from the statement that the letters "provide a glimpse of you as basically a worthwhile person...." Unfortunately, neither of these are adequate reasons for departure from the guideline range.

[2] The Sentencing Guidelines provide that "community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." U.S.S.G. § 5H1.6. In *United States v. Burch*, 873 F.2d 765 (5th Cir. 1989), we recognized that community ties are generally irrelevant to sentencing except in extraordinary cases. *Id.* at 768. We have interpreted the Sentencing Commission's decision in § 5H1 explicitly to eliminate certain factors from sentencing as an indication of the fact that the Commission has already taken those particular factors into account. *United States v. White*, 945 F.2d 100,

102 (5th Cir. 1991). Downward departures are permitted under 18 U.S.C. § 3553(b) only if a mitigating factor was "*not* adequately taken into consideration by the Sentencing Commission in formulating the guidelines." (emphasis added). Thus, in *White*, we held that because § 5H1.1 specifically eliminated youthfulness as a sentencing consideration, the Commission had indeed taken youthfulness into account and a district court could not base a downward departure on this factor. *Id.* The same reasoning applies to the Commission's decision, plainly expressed in § 5H1.6, to eliminate community ties as a relevant factor. Section 5H1 'points to an overall sentencing scheme that is crime-specific rather than offender-specific, and expresses a return "to a philosophy that the punishment should fit the crime ...'" *Id.* at 101-02 (citing *United States v. Mejia-Orosco*, 867 F.2d 216, 218 (5th Cir.), *cert. denied*, 492 U.S. 924, 109 S.Ct. 3257, 106 L.Ed.2d 602 (1989)). The factors enumerated in § 5H1 may supply a basis for determining what term of imprisonment is appropriate *within* the applicable Guideline range, *United States v. Lara-Velasquez*, 919 F.2d 946, 955 (5th Cir. 1990), but they cannot be used to depart below the range. Thus, O'Brien's community ties were an improper basis for downward departure.

[3-5] The notion that O'Brien possessed the redeeming characteristic of being a "worthwhile person" similarly does not provide an adequate basis for departure. In *United States v. Reed*, 882 F.2d 147 (5th Cir. 1989), we rejected the justification that "there is something good in [the defendant]" as a basis for downward departure. *Id.* at 151. There is no meaningful distinction between the court's statement in *Reed* and the statement in this case. Both indicate that a sentence was based on individual characteristics and "partake of the model of penology that Congress rejected in the Sentencing Reform Act." *Burch*, 878 F.2d at 767. Congress intended to eliminate these

personal factors from sentencing regardless of a district judge's assessment of their relevance to the justice of any particular sentence.[1]

We therefore AFFIRM the judgment of conviction, but VACATE the sentence and REMAND for resentencing.

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[1] The government argues that the district judge relied on two additional reasons for the downward departure: O'Brien's degree of remorse at his allocution and his potential for rehabilitation. While it is not entirely clear to us from the record that these reasons played a part, we express our views on the use of these reasons as part of our mandate when remanding to give "such instructions as the court deems appropriate ..." 18 U.S.C. § 3742(e)(1); *United States v. Burch*, 873 F.2d 765, 768 (5th Cir. 1989).

First, the remorse and acceptance of responsibility for the crime O'Brien expressed at his allocution cannot be a valid reason for departure after a reduction in the base offense level has been made under § 3E1.1 of the Guidelines. The Guidelines took acceptance of responsibility into account in § 3E1.1, and the judge determined that this entitled O'Brien to a reduction in his sentence. A second departure for acceptance of responsibility is not warranted. Second, rehabilitative potential is not a valid basis for downward departure. *United States v. Lara-Velasquez*, 919 F.2d 946, 955 (5th Cir. 1990).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	)	**No. A-89-CR-108(1)**
VS.	)	**Austin, Texas**
	)	**March 9, 1993**
JOHN DEREK O'BRIEN	)	

TRANSCRIPT OF RESENTENCING PROCEEDINGS

BEFORE THE HONORABLE JAMES R. NOWLIN

APPEARANCES:

For the Government:
Mr. Gerald Carruth
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For the Defendant:
Mr. Dick DeGuerin
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MARCH 9, 1993

THE CLERK: The court calls A-89-CR-108, Defendant 1, United States of America versus John Derek O'Brien, for resentencing.

MR. CARRUTH: Gerald Carruth for the United States, Your Honor. We're ready.

MR. DeGUERIN: Dick DeGuerin for Defendant Derek O'Brien, Your Honor. He's present. We're ready.

THE COURT: Mr. O'Brien, if you would come forward, please.

MR. O'BRIEN: Yes, sir.

THE COURT: Mr. John Derek O'Brien, you appeared before this court on May 23rd, 1990. And at that time, the court accepted your guilty plea. and on September 21st, 1990, you appeared before this court for sentencing.

MR. O'BRIEN: Yes, Your Honor.

THE COURT: And based on the February 24th, 1992, mandate of the Fifth Circuit, you're now before the court for

resentencing.

Now, at the September 21st, 1990, sentencing, the hearing that we had here before the court, I advised you of your right to appeal any sentence that's imposed by the court to the United States Court of Appeals for the Fifth Circuit under those circumstances that are set out in Title 18, United States Code, Section 3742(A)(1).

And I believe an appeal letter -- we always do it, so I think it was done in your case -- was over my signature, was given to you or your attorney at that time.

And I'm just mentioning this to you, because I want to make sure that you know and the record reflects that the instructions, the rights that you have to appeal contained in that letter are as effective today and applicable to you as they were back in September of 1990.

MR. O'BRIEN: Yes, Your Honor.

THE COURT: Mr. O'Brien, have you had an opportunity to review the -- again the presentence report and the addendum to that report that was provided to me by the probation office? I suppose it's provided to you.

MR. O'BRIEN: Yes, Your Honor.

THE COURT: I had requested -- it came from me. I requested the probation office to talk to you one more time before this hearing, because so much time had elapsed since the last time to make sure that we're brought up-to-date on all those things that had affected your life since you were here last.

And I've received and read that report.

And you have also, right?

MR. O'BRIEN: Yes, Your Honor.

THE COURT: Do you have anything that you would like to say, Mr. O'Brien, about that presentence report or the addendum at this time?

I'm going to give you an opportunity to say anything you want to, but the focus right now --

MR. O'BRIEN: Right.

THE COURT: -- is on the presentence report.

MR. O'BRIEN: No, sir, I don't.

THE COURT: Mr. DeGuerin, do you have anything you would like to say about the presentence report of the addendum?

MR. DeGUERIN: Not about the presentence report or the

addendum, Your Honor.
THE COURT: Now is the time, Mr. O'Brien, if you want to, that you can say anything you would like to the court in your own behalf or in mitigation of punishment.
MR. O'BRIEN: Yes, Your Honor, I would like to. I want to thank you for the opportunity to speak today, and I hope you can be a little bit patient with me, because I'm more nervous today than I was back in 1990 when I appeared before you, so --
THE COURT: I'm always patient with laymen.
MR. O'BRIEN: Okay.
THE COURT: I'm not patient with lawyers.
MR. O'BRIEN: All right. I'll keep that in mind. I appreciate that. Well, as you know it's been nearly four years since I was arrested and almost two and a half years since my original sentencing.
And I appreciate the opportunity to have a chance to tell you what I have been doing with my life since then and what I've learned so you'll be more fully informed when you sentence me today.
I feel that I have been very lucky. I've had many

opportunities to work. I work seven days a week sometimes. I've stayed very busy with my career.

Also, I have been able to perform additional community service by working with various charitable organizations here in town.

I think the most important thing I've done during my period on bond is to pursue continual -- continued counseling -- excuse me. and I've done that in individual psychotherapy with Dr. Tina Dubin and Dr. Rochelle Satterfield. I think you have letters from those two therapists in your file.

In that counseling, I've worked on the areas of taking responsibility for my actions, self-esteem, family issues and, in general, exploring the reasons why I committed this offense.

As much as I would like to, I can't undo my misguided actions. However, I have learned through continued counseling that the best way to make amends to my family and friends and those individuals I've hurt, as well as the community at large, is to take definite steps to get my life moving in a more positive direction.

One clear lesson I've learned from getting into trouble is

that if you concentrate and work hard on positive goals in your life every day, you do get results. And I think I've seen these results in my career.

Since my original arrest and sentencing, I've had expanded opportunities to work, and I've stayed very busy and very happy about that. I believe that these opportunities have sprung from my desire to do right and to work hard and stay out of trouble.

I've appeared on the television program Austin City Limits three times and a similar show called the Texas Connection twice.

I've also been on a German music T.V. show. I've performed in several foreign countries including France, Germany, Norway, Denmark, Switzerland and Canada. I also have upcoming opportunities to work in Japan and Australia. I've done more recording work than ever before, and this is something I really enjoy and care about.

I have been on over fourteen albums, and I think the majority of them since I have been arrested. I had -- I think partly because of the recording work I do, I had -- I got a call

from Mick Jagger's producer to audition for his solo album.

I didn't get the job, but I felt it was a great opportunity to make the final cut in those auditions. And I think this is significant, because he's a world-famous recording artist, and he sells records in the tens of millions.

THE COURT: Mr. O'Brien, even I have heard him.

MR. O'BRIEN: Okay. All right. Thank you. But it was a rare opportunity and proud I got to do it.

I also was chosen to be one of nine musicians to represent Texas in the Twenty-Seventh Annual MITEM convention in France. This is the world's largest music business convention. And I was very proud to be among those people that I considered to be cultural ambassadors.

I'm definitely not rich, and I'm not famous, but I have done all these things since my arrest and sentencing. And I hope they provide you with a useful overview of my employment record.

Another area I would like to speak about is that of

community service. I have been able to work with various social service organizations and charitable organizations to do this.

And one such group I've especially enjoyed working with is called When the Music Stops. And it's an organization that benefits the victims of violent crimes. And I've performed on their benefits as well as help them organize benefits.

This is very close to my heart, because someone I love very dearly was the victim of a violent crime several years ago. And when the State Crime Victims Fund became depleted, she was finding it very difficult to meet her ongoing medical expenses.

So, it does have a special meaning for me. And the money we raise with these benefits goes directly to the victims.

And some other groups I've worked with here in town are Parents Anonymous, which is an organization to prevent child abuse; the Austin Blood Drive; Meals on Wheels; Wilderness Counseling, which is a drug counseling organization for teenagers; the Battered Women's Center; the Age Foundation, Communities In Schools.

I've also worked in the Austin Adopt-a-School program. And the work I did was to tutor a fifth grader of the Austin School who was having trouble with his social studies, and I did enjoy that very much.

I've also appeared on a yearly musical program at Zavala Elementary, and that's a lot of fun. I enjoyed doing it.

This type of service is very meaningful to me, because I feel that it allows me to use my abilities, such as they are, to give something back to the community and also make amends to the community for what I've done.

All these activities I've discussed have shown me what concentration on the right things can do. I honestly feel that getting arrested did give me a hard and painful shove in the right direction.

It definitely made me realize that I was at strong risk of losing the things that I cared about the most, which is the love of my family and friends, as well as any hope of success in my musical career.

Right after my arrest, I realized at the time the work I had put into my career would be wasted due to prolonged absence

from society.

I -- the music business is very ephemeral, and its structure is kind of a shifting network. You've got to be there every day and work to maintain your place in this network. There's no guarantees, and it's difficult to re-establish yourself after a prolonged absence.

Your original departure gave me a renewed sense that I would be able to put my life back on track. And it also helped me put aside the feelings of bitterness, defeat and self-pity that I think make it hard for many offenders to become positive, productive people.

Your Honor, it's very, very important that you know that your judgment of me as a person deserving such a departure is correct and that I'm very grateful for it.

I don't really understand the sentencing guidelines or how they affect what you do.

THE COURT: I think the circuit's told me that I don't understand them, either, but --

MR. O'BRIEN: Well, one thing I do understand is that since my arrest and sentencing, I have turned my life to a more

positive direction. I've had an extraordinary length of time to make substantial changes in my life, and I have used that time well to pursue counseling, concentrate on my career and also perform community service.

Through this time, I've come to the solid determination that I have had enough trouble in my life, and I will behave responsibly.

My record emphatically proves I can handle supervised release situation well, I've faithfully requested permission for all travel. And this court and the U.S. Magistrate and the U.S. Attorney have thankfully allowed me to pursue career opportunities by granting me permission to travel internationally on numerous occasions. And that is a privilege, and I do treat that privilege with respect.

I've also reported diligently to my pretrial officers, and I've lived strictly within the confines set out in my bond. I've always tested drug free. And I am a nonviolent person, and I always have been a nonviolent person.

I don't wish to express any disrespect for the law, Your

Honor, nor do I wish to belabor the obvious to this court. So I hope that I can say what's in my heart without seeming presumptuous in any way.

I have had a long time to reflect on this, and I can't see what society has to gain at this point from my incarceration.

It is obvious that in prison I'll be punished by losing my income. The downside of this to society is that I will also not be paying taxes, performing community service, or making any other significant financial or social contributions to the community.

It will cost society money to house and feed me. My ability to make a living will be diminished upon my release, and it will take me a good deal longer to pay any fine that I'm assessed.

I committed a crime, and I am ready to pay that debt to society in any way you see fit, Your Honor. I'm not asking a reward of lenience just for figuring out -- figuring something out that I should have known all along.

But I do feel strongly that having turned my life around,

I'm now an asset to society rather than a threat to it. I would much rather remain a functional and productive citizen in this community rather than become another financial burden on the community.

And I also know that I could be a very positive role model to young people or anyone who thinks that drugs are the answer to their personal problems or there are shortcuts to a meaningful or successful life.

Your Honor, you said at my original sentencing that there was a time you could have imposed a fine, community service and probation in a case like this. And I realize we are living in a different time and living under different rules.

Nevertheless, your positive assessment of me as a person deserving a significant downward departure is completely correct, completely accurate. And it has given me the resolve to do right. And I want to thank you for that -- placing that trust in me, and I want to thank you for letting me speak to you here today in your court.

THE COURT: Mr. DeGuerin, do you have anything you would like to say further in behalf of the defendant before

sentence is imposed?

MR. DeGUERIN: I would, Your Honor, if I might. I would like to ask the court to accept the pleadings that we filed recently which consists of a number of letters that have been filed and submitted to the probation department.

THE COURT: Mr. DeGuerin, that is this document you're referring to right here?

MR. DeGUERIN: Yes, sir.

THE COURT: Has this been made a part of the record in this case?

MR. DeGUERIN: It's has been filed in the clerk's office. It has not been marked as an exhibit.

THE COURT: Let me suggest to you -- I'll do it or you can do it. I can do it in behalf of the court, or you can do it in behalf of the defendant --to make these letters -- I did it before.

I've received some letters recently. I don't know whether they're part of this exhibit or not. I have one dated February 25th and -- on here without a date on it. And I just

received -- some of them dated in March, this month. I have read them. I've read these. In the event that they're not know here, I would suggest that these materials be admitted into evidence for purposes of this hearing as exhibits.

MR. DeGUERIN: Yes, sir. That's what I intend to ask.

THE COURT: All right.

MR. DeGUERIN: And likewise, the National Center For Institutional Alternative --Institutions On Alternatives has filed a presentence report.

THE COURT: Yes, sir.

MR. DeGUERIN: We would ask that that be accepted as evidence.

THE COURT: Uh-huh.

MR. DeGUERIN: I have today filed a sentencing memoranda suggesting a downward departure and proposed findings.

THE COURT: Yes, sir. I have that.

MR. DeGUERIN: And it's that that I would like to speak about. I think there's ample evidence before

the court
for the basis for the downward departure that we intend to ask
for.
First, regarding the appeal and what the Court of Appeals
did say and what the Court of Appeals didn't say.

THE COURT: Mr. DeGuerin, I don't want to interrupt
you too often, but the bottom line -- and you correct me if I'm
wrong -- is the Court of Appeals basically said that I didn't
say enough.

MR. DeGUERIN: That's exactly right.

THE COURT: And --

MR. DeGUERIN: And not --

THE COURT: And I'll have to say you can understand
sitting in my position, especially having labored under the old
system, that I see -- and those here in the courtroom see a lot
of things looking at individuals and talking with the U.S.
Attorney and talking with defense lawyers.
Sometimes I assume it will appear in the record, and it
doesn't really look that way. So, I'm the first to confess my guilt

frequently in not making enough findings or saying enough when I see something that I think is absolutely right and ought to be done.

And I think my mistake in doing that is why we're here. And I apologize for that.

MR. DeGUERIN: Well, there's no apology necessary, Judge. And I perhaps led you into that mistake by submitting some proposed findings after the fact and the proposed -- and findings that you formulated were done so after the fact.

And I think -- and they were never discussed by the Fifth Circuit in spite of a motion for rehearing asking them to discuss those written findings.

And so what I think the bottom line is you have to make whatever findings you make on the record today in -- and that's why I submitted those proposed findings.

The Court of Appeals did not say that you cannot depart for reasons that you find to be sufficient. There are sufficient reasons in the record, I believe, that you can depart not only to a lesser sentence but even to a probated sentence, I believe.

And at the risk to simply parodying what others have said before me, this is that special case. This is that rare case.

As much as I practice in your court and other courts, as much as you see what comes before you, you know and I know that this is an extraordinary case. This is a case of extraordinary rehabilitation, not potential but efforts accomplished.

In addition to that, extraordinary service to the community as rehabilitative efforts justifying what -- that slightly open door that the Sentencing Commission left and that the statute left.

18 U.S.C. 3553, Section B, I think, and the Section 5K2.0 of the sentencing guidelines leaves the door open for you to make that finding. I've suggested those findings, and we ask that you do so. I don't have -- I couldn't add anything to what Derek O'Brien has said to you, words that come from the heart. And they're all true.

THE COURT: All right. Mr. O'Brien, do you know of any legal reason why the court should not impose sentence at this time?

MR. O'BRIEN: No, Your Honor.

THE COURT: Mr. DeGuerin, do you know of any such legal reason?

MR. DeGUERIN: No, sir.

THE COURT: Mr. Carruth, it's your turn.

MR. CARRUTH: Thank you, Your Honor. Mr. O'Brien was arrested and indicted along with two other co-defendants and co-conspirators after being found in possession of 789 growing marijuana plants.

And what the evidence presented and heard by this court in the trial of the co-defendant, Charles Pace, indicated was a commercial marijuana growing and trafficking enterprise.

Mr. Pace went to trial, was convicted on all counts by the jury, and this court sentenced Mr. Pace to a term of sixty months confinement.

Mr. Trainer, the other co-defendant, pleaded guilty, was sentenced by this court to thirty-three months confinement.

Mr. O'Brien is no less culpable of this offense than his co-defendants. And the punishment, Your Honor, should fit the

crime as the Fifth Circuit pointed out in reversing this court's prior sentence of Mr. O'Brien who, after listening to Mr. DeGuerin, led the court down the primrose path, reversible error.

And I think the law of the case in this case is clear what we're hearing today is more of the same of what we heard back in September of 1990 at the earlier sentencing proceeding, and the Fifth Circuit found that that was not sufficient grounds for a downward departure. It was not sufficient then, it's not sufficient now.

The Fifth Circuit pointed out that the reason for the sentencing guidelines, regardless how any of us personally may feel about them, they are the law of the land, and they're designed to prevent and prohibit exactly what Mr. DeGuerin is seeking to have this court to do today.

And that is to make the punishment fit the individual offender whether -- rather than make the punishment fit the crime. And the sentencing guidelines have adopted an overall sentencing scheme that is offense specific rather than offender

specific.

And the fact that Mr. O'Brien may have done good deeds in the community, while commendable, is simple not grounds for downward departure as the Fifth Circuit articulated in its opinion in this case.

I find it also very interesting, Your Honor, in the sentencing report that was prepared by the National Center On Institutions and Alternatives, although hasn't been specifically mentioned by Mr. DeGuerin, was introduced into evidence. And they talk in there about aberrant behavior as being one of the reasons for downward departure.

And I find it interesting that of the cases they cite -- I believe two of them are Ninth Circuit cases -- they don't cite any Fifth Circuit cases anywhere in here.

And one of the cases --

THE COURT: Mr. Carruth, I believe that if we had been in another -- most any other circuit, we wouldn't be here today.

But you're correct --

MR. CARRUTH: Well, I believe we have Fifth Circuit

precedent for this case, Your Honor, and it isn't this case.

THE COURT: No. I understand that. I said if we had been in any other circuit other than the Fifth Circuit.

MR. CARRUTH: I understand. Well, I would like to point out simply that those cases they cited and rely upon all involve instances where the defendants either voluntarily terminated their criminal conduct and/or assisted the government in some way in either recovering or retrieving the fruits of the crime or in cooperating against other co-defendants.

That did not occur in this case. The court will remember that this defendant has never stood up and unconditionally pleaded guilty to the offense with which he was charged.

He entered into a conditional plea agreement with the government conditioned on his appeal of this court's well-reasoned and scholarly opinion regarding the search of the barn in this case which was upheld all the way to the Supreme Court of the United States and is a very commendable opinion. But he conditioned his plea on appeal of that particular finding.

When he testified at the Simmons hearing in here on the pretrial hearing, counsel asked him two questions in order to establish standing. He said, "Did you rent the property out there from Mr. Pace?"

"Yes, I did."

"Did you have the right to exclude other people from the property?"

"Yes, I did."

And then he passed the witness. And it was only under cross-examination by the government over objection of Mr. DeGuerin that he was permitted to testify that his purpose in renting this barn in this area out there, in the rural area, from Mr. Pace was for the purpose of growing marijuana, and Mr. Pace was going to get part of the proceeds of the marijuana sold and harvested as to quid pro quo for the renting of the property.

At no time did Mr. O'Brien voluntarily terminate his criminal conduct. If he had not been caught, he may well be doing out there today what he was doing back then.

At no time did he ever offer to cooperate with the government. In fact, when Mr. Pace went to trial before this

court and put the government to its test before a jury, this defendant was specifically asked to come in and testify, and the government offered to grant him use immunity if he would testify against Mr. Pace. He declined to do so.

He did not help the government at all. He did not assist the government in the recovery of any of the fruits of the crime or instrumentalities of the crime. He said, "I come in here and plea conditionally that if the higher courts find that the search was legal, then I'm guilty."

This court gave him a break already at the last sentencing hearing by granting him a two-level reduction for acceptance of responsibility over the recommendation of the probation office and the government which pointed out to the court -- I don't want to rehash that, but I want to say that he's already been given a break, because he met none of the tests articulated in the guidelines for acceptance of responsibility.

So he's already been given a break. He was given a break by the government in being allowed to plead guilty to a lessor included offense carrying a maximum sentence of twenty years

rather than a minimum of five and a maximum of forty.

So Mr. O'Brien has already received his share of good breaks in this case. And there's no reason for this court to depart downward and to treat him any differently because of who he is or what he has done than the court has treated Mr. Trainer and Mr.Pace.

Thank you.

THE COURT: Well, I think, Mr. Carruth the major difference that I could see at the time of sentencing, as I recall -- and this has been a while back -- between this defendant and the other co-defendants was that even before it would have been of value or benefit to him with regard to a sentencing consideration that this defendant had done a lot for his community.

And I understand that the circuit has said that's not enough. But I'm saying that was in my mind at the time one of the major differences between those --between him and others and that there was a selflessness in this man that didn't exist

in the record pre-crime, during crime, between crime and conviction, and between conviction and sentencing in the others.

MR. CARRUTH: That has been addressed by the Sentencing Commission, Your Honor, in Section 5H1.11 which holds that military, civic, charitable or public service or employment-related contributions -- and that's what he's done. He's played in his band, his business -- and similar prior good works are not relevant in determining what sentence should be imposed.

So that is a factor that has been addressed and held not to be relevant by the Sentencing Commission.

THE COURT: I understand that. And I personally consider that to frequently yield an unjust result. But I agree with you that's the situation.

MR CARRUTH: Thank you, Your Honor.

THE COURT: Mr. DeGuerin?

MR. DeGUERIN: If I might correct that last sentence, Judge, I think that what that speaks to is pre-existing - pre-crime contributions to the community. That's what that

section speaks to. And we've not -- there's a distinction between that post crime rehabilitation which is what we're --

THE COURT: Mr. DeGuerin and Mr. Carruth, I ask both of you this if you know. Do the guidelines speak anywhere to the purpose -- purposes of the guidelines and the purpose of sentencing under the guidelines?

MR. DeGUERIN: Yes, they do.

THE COURT: Is that spoken to anywhere in the guidelines? What does it say about that?

MR. DeGUERIN: I can't quote you the section, Judge, but there is a section that says -- astonishingly so, says rehabilitation is not a purpose of the sentencing guidelines.

However, that does not preclude -- and several circuits have held that it does not preclude the court considering rehabilitative efforts, one, in determining acceptance of responsibility -- this is post crime presentence rehabilitation in determining whether to grant the two-point -- now three-

point -- reduction for acceptance of responsibility.

And there is that body of case law in at least the First, Sixth D.C. Circuit that speaks to extraordinary efforts, not run of the mill, not what would be expected in someone that's trying to put their best foot forward for sentencing, not someone who is just simply trying to impress the court, which, although laudible, happens in many cases, as Your Honor knows.

What it speaks to, what these cases speak to is the exception, something that goes far beyond what is to be expected. We have that here.

We have the proselytizing efforts of Mr. O'Brien to convince others to stay away from drug abuse. We have the rehabilitation that goes far beyond what is to be expected. And that's why I believe that the court would be justified in finding such an exceptional situation. Both 5K2.0 provide for it and 18 U.S.C. 3553(b) provide for it.

At the sake of going on too long, let me just quote what I've quoted in the pleading I filed today. And that's from U.S. versus Sklar. And I'm going to skip around. "We think that

merited downward departures for rehabilitation are likely to be few and far between."

Skipping over, "It is only the occasional instance where time and circumstances permit and the accused takes full advantage of both that will produce rehabilitation so dramatic as to cross the boundary. Thus, we recognize that departures will always remain, as well they should, the exception, not the rule."

This is the exception, Your Honor.

MR. CARRUTH: If I might briefly respond to the court's inquiry as to the statutory mission of the guidelines as set forth in Chapter 1.

Rehabilitation is but one of the four factors that the guidelines were intending to accomplish in furthering the basic purposes of criminal punishment. The other is being deterrence, incapacitation, just punishment, and fourth, rehabilitation.

Is it just punishment to give what Mr. DeGuerin seeks for his clients? Is it deterrence for other individuals who might be so inclined?

Mr. O'Brien had his opportunity to clean up

his act back in
1979 when he was arrested at a border patrol checkpoint in South
Texas and found to be in possession of five grams of heroin, one
gram of cocaine, three grams of hashish, one-half ounce of
marijuana, a .45 caliber semiautomatic pistol and a Colt Python
.357 Magnum pistol.

MR. DeGUERIN: Well, I'm astonished. The court has
found, and Mr. O'Brien was found to have been innocent of any
complicity in that event.

He was driving a van transporting musical equipment for a
musical group. He took a polygraph test and passed it. The
case was dismissed by the Corpus Christi District Attorney's
Office.

And this court previously was fully aware of that and
disregarded that entirely. That is thrown before Your Honor as
a last-minute desperate effort. And I'm astonished.

THE COURT: All right. Have I asked you -- I think
I -- I've been through the legal reasons why, have I not? Did I
ask you if you know any legal reason? Did I ask you, Mr.
DeGuerin?

MR. CARRUTH: Yes, sir.

THE COURT: Then I'll recognize -- do you know of any -- anything else you want to say?

MR. CARRUTH: Nothing further, Your Honor.

THE COURT: All right.

MR DeGUERIN: One other thing, Judge. And I should have mentioned it at the time of the presentence. The guidelines have changed somewhat so that there's a three-point deduction for acceptance of responsibility now rather than two.

THE COURT: Mr. DeGuerin and Mr.Carruth, Mr. O'Brien, you all know that I have some difficulty working with these guidelines sometime. I know you do, too. It's not something that's limited to me.

There are occasions -- and I agree with Mr.DeGuerin -- they're rare. In this court, they have been rare where the court recognizes that there has been some unusual situation which dictates that if justice is to be done, the court needs to depart, sometimes downward, sometimes upward.

And I have reviewed the record in this case that has occurred since the time of conviction. And I can certainly understand the government's desire to have people cooperate with them and make their job easier and also help to apprehend more people who are dangerous to the community.

But reviewing the record since the conviction, the court is -- in a long period of time is impressed with what Mr. O'Brien has done. I think it has proved that my judgment in the beginning with regard to Mr. O'Brien was a correct judgment from a justice standpoint. and I certainly am sympathetic with the job that Mr. Carruth has and the position he takes and has to take.

My personal view about this is, in looking at the record, that it would be extremely unjust to incarcerate an individual like Mr. O'Brien based upon what he has proven he can do for the community.

If the law -- the guidelines require a judge like myself, after sitting here and observing and listening to the participants and having the opportunity to look eye to eye with the defendant and make a judgment -- and it's frequently

subjective -- but make a judgment as to the rehabilitative nature of the defendant and what he or she has done in the past, if I'm to be able to do that, I'm going to have to take into consideration some of these important factors that I think can only be done by someone who is here on the spot making these observations listening to the participants.

I would be as, you all know, very happy if my brothers and sisters on the circuit bench would do the sentencing for me. I'm of the view that if the circuit judges were to have been in my place back in -- whenever it was when we did the sentencing -- that they would have done a similar thing.

But I understand they don't have the opportunity to be here and to see what happens and see the participants and make those sometimes objective judgments.

Now, they're difficult -- those subjective judgments are difficult to make and to enforce using the guidelines, because as counsel have indicated, these guidelines primarily punish the crime and not the offender, which I think is frequently the wrong thing to do, because there's no two offenders that are the

same. Nevertheless, that's the theme of the guidelines.

I think that the -- to offset that possible problem where offenders are different, and yet the guidelines require that the offense be punished and not the offender. the guidelines provide for a difficult but occasional use of departures.

And I think that it's this kind of case that justifies that kind of departure. If the law in this case requires this court to do anything other than what it is about to do, then the law is unjust, and something ought to be done about it.

I can't do anything about it anymore. I'm not in that position. But somebody ought to do something like it if the law requires it.

I don't think the law to requires that it be different than what this court is going to do. But if it turns out that way, I think the law is unjust. I don't get paid enough to sit up here and administer injustice.

So, Mr. O'Brien, if you would step over here a little bit towards the microphone then, we'll get this over with.

MR. O'BRIEN: Yes, Your Honor.

THE COURT: I noted, Mr. O'Brien, that on Page 14, I

believe it was -- or is -- of the original presentence investigation report in your case, Mr. Ed Gleason, who then was the probation officer that drafted that report, wrote -- and I quote, "It is the intent of the guidelines to use departures for unusual and/or remarkable circumstances within the conduct of the criminal behavior."

That was in the original presentence report. I agree with that.

MR. O'BRIEN: Yes, Your Honor.

THE COURT: And I think your case here, because of the period of experience that we have had, if nothing else, indicates that this is one of those circumstances that is unusual and remarkable.

So pursuant to the provisions of Section 5K2.0, the court finds in this case that the base offense level, which is 20, as developed by the court at the last hearing overrepresents the actual seriousness of the defendant's criminality in the commission of the specific offenses for which he has been convicted, and that the defendant in this case, criminality is

clearly atypical of his demonstrated behavior within the community.

Also, in reaching the determination, as I have and considering all those things I'm required to consider under the Sentencing Reform Act of 1984, a determination of an appropriate sentence in your case, Mr. O'Brien, has required the court to consider carefully the provisions of Title 18, United States Code, Section 3661, which, in essence, provides that there is no limitation on the information that may be considered by the court in fixing an appropriate sentence, and Title 18, United States Code, Section 3553, wherein the court is required to consider the history and characteristics of the defendant.

Considering all of these matters, the court finds that there -- in the interest of justice require a downward departure in this case, and the following sentence is imposed.

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of this court that the defendant, John Derek O'Brien, is hereby placed on probation for a term of five years on Counts 1 and 2 to run concurrently.

It's further ordered that the defendant pay the United States a fine in the amount of ten thousand dollars, interest being waived.

It's further ordered that the defendant pay the United States a special assessment in the amount of one hundred dollars.

The court is going to set at least three special conditions of probation in your case, Mr. O'Brien. The first is that while on probation, the defendant shall not commit another federal, state or local crime, and you comply with the standard conditions of probation and release adopted by this court;

The second, that you pay a total fine in the amount of ten thousand in monthly installments developed by the United States Probation Office with the first payment due on the first business day of April, 1993, and like payments made on the first business day of each and every month thereafter until the total amount of ten thousand dollars is fully paid;

The last being that during the period of probation, you perform at least four hundred hours of community service as

directed by the United States Probation Office, which may include appearances and work at schools and educational institutions at the elementary and secondary levels to encourage young people to avoid the use of controlled substances.

Anything further?

MR. DeGUERIN: No, Your Honor.

THE COURT: Thank you all very much. You may be excused.

MR. CARRUTH: Your Honor, excuse me. Could we have a specific finding for the record? Are we to assume -- and if I'm incorrect, please advise me. Are we to assume that the court's reasons for departing downward even further today --

THE COURT: My reasons for departing downward, Mr. Carruth, are specifically set. I put them on the record. and all you have to do is get a copy of the record, if you want it, and read it.

MR. CARRUTH: Well, Your Honor, I'm simply saying the term, whether or not the court considered what transpired from

September 20th of 1990, the last sentencing hearing, and today

In departing downward even further than --

THE COURT: The court has considered the entire record in this case, Mr. Carruth, from the beginning to the end, world without end.

MR. CARRUTH: Amen.

THE COURT: Amen.

MR. CARRUTH: Thank you, Your Honor.

THE COURT: Thank you. We'll stand in brief recess.

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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